MTHANDAZO MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 10 & 24 FEBRAURY 2022

Application for bail pending trial

T. Maduma for the applicant
B. Siansole for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is being charged with two counts of robbery as defined in section 126 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. In count one it being alleged that on the 7 January 2022, applicant in the company of unknown accomplices who are still at large proceeded to complainant's home armed with machete and knobkerries. They broke the front door to gain entry into the house. While inside they manhandled the complainant and force marched him into his son's bedroom where they ordered him to lie down at the same time assaulting him and his family using a machete and knobkerries causing some bruises all over the body. Complainant was robbed on 10 grams of gold, US$900.00, open view decoder, cell phone and they damaged a 42 inch plasma television set.

In support of his bail application applicant filed a bail statement and adduced evidence by means of a supporting affidavit. He avers that he is 39 years old, resides at his own homestead at Spring Farm, Umguza off Gwanda Road. He is married with three minor children. He owns and operates a Gold Detector. He is a pastor at 12th Apostolic Church, Maqaqeni Branch at Spring Farm, Umguza. Applicant denies the charge levelled against him. He avers that on the day and time in question he was with his family, and contends that this is a case of mistaken identity. Applicant contends that it is in the interests of justice that he be released on bail pending trial.

Respondent filed a written response. In the response it is contended that this application is not opposed. Respondent submits that this case is based on identification evidence. It is said

applicant's defence is an *alibi* and it is the State's duty to disprove it. It is said the State case is weak.

In his affidavit the investigating officer avers the applicant was identified at the scene as he is a neighbour of the complainant. It is averred that during the robbery applicant's mask fell down and he was then identified by the complainant and his son.

In a bail application a court is afforded greater inquisitorial powers in such an inquiry to ensure that all material factors are investigated and established. It is on this basis that I directed that investigating officer be called to testify. The investigating officer testified that applicant is Mthandazo Moyo *alias* Tshuma. He resides at the same village with the complainant. During the robbery, as applicant was breaking the door, his accomplices provided him with light, and it is at this point that the complainant identified him. During the robbery his accomplices called him Tshuma, and that is applicant's *pseudo* name. During the robbery complainant's son was forced to carry some things to the car, and at that point applicant's mask fell down and he was identified. Applicant is well known by the complainant and his son as he resides at the same village. The police called him and invited him to the police station, and that is how he was arrested. The officer testified that nothing was recovered from the applicant.

In cross examination the officer testified that during interview with the police applicant acknowledged that his *pseudo* name is *Tshuks*, from Tshuma. Mr *Siansole* counsel for the applicant put it to this witness that all the gold panners in the area refer to each other as Tshuks, in his answer the witness said the complainant directed the police to applicant as Tshuks they were referring to. It was put to this witness that this is a case of mistaken identity, his answer was the complainant insists that applicant was one of the robbers. This witness conceded that applicant surrendered himself to the police and that there are no known cases pending against him.

In his submissions Mr *Siansole* argued that the State does not have a strong *prima facie* case against the applicant. It is contended that applicant is a pastor and that explains the reason he is well known in the community. It is argued that the offence was committed by a number of people and everyone in the community is called *Tshuks.* Counsel contends that this is a case of mistaken identity.

It is important to highlight that applicant is facing a crime referred to in Part 1 of Schedule 3 of the Criminal Procedure and Evidence Act [Chapter 9:07], being robbery,

involving the use by the accused or any co-perpetrators or participants of a firearm. In terms of section 115C (2) (a)(ii) (A) Criminal Procedure and Evidence Act applicant bears the burden of showing, on a balance of probabilities, that it is in the interests of justice that he be released on bail. It then follows that the bar for granting bail in the crime of robbery involving the use of a firearm is lifted a bit higher by the legislature. This is what the applicant has to contend with and this court must give full effect to such legislative provision.

Applicant is facing serious crime of armed robbery. The evidence linking applicant to this crime is that he was identified at the scene of crime. The incident occurred at night, *albeit* here was light in the form of torches. There were a number of robbers. The applicant is said to have been identified by the complainant and his son. At this stage there is no other evidence or fact linking the applicant to the commission of this offence. The duty of the court in a bail application is to assess the *prima facie* strength of the state case against the bail applicant as opposed to making a provisional finding on the guilt or otherwise of such an applicant. Bail proceedings are not to be viewed as a full-dress rehearsal for trial. See: *S v Van Wyk* 2005 (1) SACR 41 (SCA) at par [6].

Applicant presented himself to the police. He was then charged and lock-up. In the circumstances of this case there is no basis to say if released on bail applicant will abscond, nor did the State argue that if released on bail he will fail to attend at his trial when called upon to do so. There are no known pending cases against applicant. There is neither evidence nor facts that show that if released on bail he will interfere with the police investigations and thus jeopardise the interests of justice. There is nothing to show that if released on bail he will commit further crimes. I am of the view that the facts and evidence in this case tip the balance in favour of releasing applicant on bail.

I take cognizance applicant is facing a serious offence. Applicant is facing a serious charge of robbery, where a machete and knobkerries were allegedly used to subdue the complaint. It is trite that the seriousness of the offence charged standing alone cannot be a ground to refuse to release an applicant to bail pending trial. This is so because no matter the seriousness of the offence the presumption of innocence still operates in favour of the applicant. There must be something more than the mere seriousness of the offence for the court to refuse to admit an accused to bail. The courts should always grant bail where possible and should lean

in favour of the liberty of the accused person provided that the interests of justice will not be prejudiced. See: *S v Smith* 1969 (4) SA 175 (N) 177E –F.

In determining whether applicant should be released on bail pending trial, I have considered all factors that weigh in his favour as against those that weigh in favour of the State. I have put these factors on a judicial scale and I have come to the conclusion that it is in the interest of justice to release the applicant on bail pending his trial. He has discharged the burden on him of showing that it is in the interests of justice that he be released on bail pending trial. Again respondent made a concession both in the written submissions and in oral argument that applicant is a good candidate for admission to bail pending trial. I agree. This concession has been properly taken.

In the circumstances of this case I am satisfied that it is in the in interests of justice that applicant be released on bail pending trial. Accordingly applicant is admitted to bail on the following terms and conditions:

1. That he deposits the sum of ZWL 50 000.00 with the Registrar of the High Court, Bulawayo.
2. That he resides at stand number 68 Village 2, Spring Farm, Umguza off Gwanda Road, until this matter is finalised.
3. That he reports twice a week on Mondays and Fridays between 0600 hours and 1800 hours at ZRP Spring Farm Base, Umguza until the finalization of this matter.
4. That he does not interfere with police investigations and State witnesses in this matter.

It is so ordered.

Dube, Mguni & Dube applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners